No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ADAMANT COMPANY, a Corporation, WALTER B. SCOVILLE, JOE SEEPLE and HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Appellees.

PETITION FOR REHEARING.

LELAND J. ALLEN,
411 West Fifth Street,
Los Angeles 13, California,
Counsel for Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 12961.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE ADAMANT COMPANY, a Corporation, WALTER B. SCOVILLE, JOE SEEPLE and HARRY WYNN,

Appellants,

vs.

UNITED STATES OF AMERICA, RECONSTRUCTION FINANCE CORPORATION, HERSCHEL BULLEN, MARY N. BULLEN, J. C. HAYWARD and MARY S. HAYWARD,

Appellees.

PETITION FOR REHEARING.

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The undersigned, your petitioners, respectfully submit that they have been aggrieved by an opinion of Your Honors rendered herein on the 23rd day of May, 1952, in the respects hereinafter set forth, and pray for a rehearing of said matter:

I.

The Suspension of Appellants' Rights Is Contrary to the Trial Court's Rulings, and Is Inequitable.

The Opinion (p. 21) states:

> "The cause is, therefore, remanded to the trial court with directions to stay the execution and enforcement of the judgment as to the appellants other than Reconstruction Finance Corporation until the actions pending in the state and federal court are determined, or the parties settle them and agree upon a manner of division of the award. The trial court will retain power to hold such further hearings as may be called for by the determination or settlement of the pending actions."

Had this appellate court been enformed of the proceedings before the jury and Judge Beaumont the above rulng undoubtedly would not have been made.

This case was tried before the jury upon the *theory* and *ruling* by Judge Beaumont that he would not and did not *suspend proceedings* in this condemnation action for the purpose of compelling Mr. Wynn to proceed with his action in the state court or of compelling the Adamant Company and Scoville to proceed with their accounting action in the federal court, *but that the question of ownership in Treasure well would be decided in the condemnation action.*

Judge Beaumont received the testimony as to the ownership of working interests pertaining to all 47 per cent working interests belonging to these appellants.

Furthermore, Judge Westover also received evidence pertaining to the working interests, even going so far as to set aside the sheriff's certificate of sale of 2½ per cent

of Mr. Wynn's working interests, holding that the sheriff's sale was void and that Mr. Wynn retained said 2½ per cent working interest and in addition thereto had a 2½ per cent working interest, or a total of 5 per cent, *which was subject only* to a maintenance and operation charge of *not to exceed* $10.00 a month, a 1 per cent. [R. p. 87.] (Wynn also had an additional 1 per cent royalty.)

There was an agreement, amounting to a stipulation, between the attorneys for the government who represented the Reconstruction Finance Corporation, in the jury trial and the attorneys for these appellants that these appellants should establish their ownership in the case at bar.

While the stipulation mentioned Wynn specifically, the trial court applied his ruling to all of these appellants.

We quote from the record, as follows:

Stipulation and Ruling of Court.

"Mr. McPherson: With respect to the Wynn item or matter, it has been concluded that the Government will withdraw its objection to Mr. Wynn's testifying, and his testimony, and permit it to stand *both* as to the *Treasure well* and Burns' Leases 2 and 3, provided the withdrawal of this objection is understood as not conceding on the part of the Government that Wynn has such an interest in either as would entitle him to a distributive share of whatever award is made.

Mr. Allen: That is satisfactory.

Mr. Grivi: That is all right.

The Court: Then will you add that further part there, *that the matter of determination as to whether or not he is entitled to any distributive share is one to be made by the court after the verdict of the jury has been returned into court?*

Mr. McPherson: The reporter has just taken the court's (1092) statement, and that is agreeable.

Mr. Allen: We so understand and that is agreeable." [R. pp. 972-973.]

Government Refuses to Dismiss as to Mr. Wynn's Right to Establish His Ownership in Case at Bar.

"The Court: Do you move to dismiss the action, then, as to Mr. Wynn?

Mr. McPherson: No.

The Court: Well, if they are improperly joined, why should he not be dismissed?

Mr. McPherson: Because we are now on notice that he claims an interest, and I wouldn't dismiss a suit against anyone who claims an interest simply because I don't think he has one. (1026.)

The Court: Well, the Government is responsible for the action.

Mr. McPherson: For having joined him, yes." [R. p. 918.]

Judge Beaumont further stated:

"The Court: It is true, as Mr. Allen states, that all of the property of value within this area has been condemned, and *this is the time* for the defendants to present their evidence *showing their interests.* The Court would either have to pass upon it, *even though* it is the *subject of litigation in the State court,* or would have to suspend the proceedings without prejudice to the defendant until the determination in the State court. That was one of the things that the Court had in mind. The Court would be *reluctant* to do that without the consent of the defendants." [R. p. 895.]

Ownership of Appellants' Royalties Is Res Judicata.

"The Court: The Court is going to adjourn until tomorrow at 10:30, when we will go over these proposed instructions.

I guess you gentlemen realize that you are presenting a very difficult problem to the Court, to endeavor to decide it in the course of this trial.

The court may have to, in order that no injustice may be done to any party, suspend this proceeding, *which the court has a right to do, until determination of these other matters.*

There are two cases now, you state, in which these interests are considered. That is correct, isn't it?

Mr. Allen: Let me explain that. The State court action involves Harry Wynn alone for the accumulations on his 6 per cent and attacking this execution sale. Then the case before Judge Hall, which is before the Master, that involves an accounting of percents that are already recognized, *because Judge Hall ruled that the matter of ownership of the percents was res judicata* under the State court action and that (1028) involved an accounting *up to* the date of seizure.

The Court: Does that involve these present per cents?

Mr. Allen: No. Mr. Wynn is not a party to that. It is the Adamant Company and Walter B. Scoville in the Federal Court.

The Court: Then Judge Hall's action does not involve the ownership of these per cents that you have just discussed?

Mr. Allen: No, your Honor, except that 1 per cent which he said was *res judicata* of the State Court, that formerly stood in Mr. Scoville's name, that might incidentally be involved, but he has ruled against the

defendants and said that is already decided in the State court. 44 per cent, in other words.

The Court: In whose favor did he say it was decided?

Mr. Allen: In our favor, Adamant and Scoville, 44 per cent.

The Court: Did that concern the 1 per cent interest of Mr. Wynn?

Mr. Allen: It concerned 44 per cent, which included Wynn and Bullen and Hayward, 3 per cent there." [R. pp. 919, 920, 921.]

These appellants are aggrieved by the ruling requiring them to finish the state court and federal court actions against Treasure Company which has *no assets* because it *assigned all its assets to the Reconstruction Finance Corporation.* [Adamant Co., et al., Ex. 1—Judge Beaumont—Feb. 23, 1950.]

Any judgment against Treasure Company in those two actions is worthless.

Furthermore, there is *no appeal* before this Circuit Court questioning the ruling of the trial judge that these appellants must and did establish their ownership of royalties in the case at bar and not in the two other actions referred to.

Since Your Honors made the ruling without knowledge of the actual proceedings in the District Court before Judge Beaumont, we request its reversal in order to maintain the theory and procedure adopted by all parties in the trial court.

II.

The Opinion Denies an Equitable Lien.

The Opinion states, in substance, that equitable liens must arise under contracts (p. 14)—that "the first assertion of a claim of equitable lien came in the Answer of the Adamant group filed on December 8, 1943" (p. 16), and that "it would be unconscionable to penalize either Treasure or its successor, Reconstruction Finance Corporation, for *the failure* of Treasure to live up to a promise to pay royalties which arose under a contract ambiguous in its terms, the meaning of which was not determined until May 18, 1942." (P. 16.)

These appellants *submit that the above premises are not the grounds upon which an equitable lien is claimed by us.*

The right to our *equitable lien against this fund* of money did not arise *until the condemnation action was filed* September 28, 1942, and the fund was deposited *in lieu* of the land taken by the government. (That is the reason we *first* asserted an equitable lien in our Answer in the case at bar.)

Five per cent of Appellant Wynn's ownership (he owns a total of 6 per cent royalty) is subject to only a *maximum charge* for maintenance and operation of $10.00 per 1 per cent per month [R. p. 87] and the well produced $205,411.39 in 3 years and 9 months.

Is it unconscionable to compel Treasure Company to pay the income out of this production instead of *evading its responsibility* and assigning all its assets to Reconstruction Finance Corporation, which corporation had notice of the claims of these appellants at least 5 years before it took over the assets of Treasure Company?

Is it unconscionable to compel both Treasure and Reconstruction Finance Corporation to recognize ownership of oil royalties established by a court decree *in the case at bar?*

The Opinion erroneously confines the right to an equitable lien "upon an ambiguous written contract or upon a fraudulent transaction."

The equitable lien in the case at bar does not depend upon either of these two premises.

The appellants established the following working interests in Treasure Well No. 8 and its leasehold: 25 per cent working interests or oil royalties belonging to the Adamant Company; 16 per cent working interests or oil royalties belonging to Walter B. Scoville; 6 per cent working interests or oil royalties belonging to Harry Wynn.

The Supreme Court of California denied a petition for hearing on June 8, 1950, in the case of *Recovery Oil Co. v. Van Acker,* 96 Cal. App. 2d 909, and thus *established the law* to the effect that

> "any obligation to pay (income upon an oil royalty) was not only a continuing one but she had *an interest in the land* which did not terminate until she actually received that amount of money. Her interest was vested *as an estate* and not as an lien. Her position was similar to that of a holder of a trust deed. The appellant, taking with notice, was in no position to demand relief in a court of equity as against the respondent, without recognizing and assuming the obligation which *continued to exist.*"

The law of condemnation and its procedure created the equitable lien *by substituting* the funds on deposit with the registry of the court in the place of the Treasure Well No. 8 leasehold.

The Opinion fails to recognize the correct basis for the creation of the equitable lien upon the funds to be allocated in the case at bar.

It must be pointed out that Treasure Company assigned all its assets to the Reconstruction Finance Corporation, and hence any judgment in an accounting action, either in the state court or in the federal court, would be *worthless* as same could not be collected against a corporation which has no assets. Treasure Company alone received the revenue from production amounting to $205,411.69.

Under the above circumstances, an equitable lien can be created *by implication,* in accordance with the decision of the Circuit Court of Appeals, 6th Circuit, as follows:

> "In the absence of an express contract, a lien based upon the fundamental maxims of equity may be implied and declared by a court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. One may, by manifest intent and agreement, create a security for the discharge of his obligation and another discharging such an obligation, if not a volunteer, has the right to look to the fund for repayment."
>
> *Cleveland Clinic Foundation v. Humphreys* (1938), 97 F. 2d 849, 121 A. L. R. 163 (C. C. A. 6th) (Writ of Certiorari denied in 305 U. S. 628, 83 L. Ed. 403, 59 S. Ct. 93.)

The Circuit Court of Appeals of the 8th Circuit held that monies advanced under oral agreement for the pay-

ment of future deliveries of coal created an equitable lien and charge enforceable against the estate in the hands of the trustee in bankruptcy.

Atchison T. & S. F. Ry. v. Hurley (1907), 153 Fed. 503 (C. C. A. 8th).

The opinion in the case at bar is contrary to the above rulings of the 6th and 8th Circuits, and contrary to the maxims of equity.

Furthermore, the opinion of this Circuit Court of Appeals decided an important question of California law in a way that *is in conflict* with the local decision of the California Appeals Court in *Recovery Oil Co. v. Van Acker, supra,* by denying that these appellants had an estate in the land condemned (transferred to the fund) until they received the income on their 47 per cent oil royalties.

The laws of condemnation were never intended to work an inequity by permitting Treasure Company to sign away all its assets to Reconstruction Finance Corporation and thus destroy the security or interest held by these appellants in the land taken in condemnation.

Under what equitable reasoning is there a penalty placed upon either Treasure Company or its successor, Reconstruction Finance Corporation, by compelling them to pay a just claim of which both companies had full knowledge.

Did those two companies agree to evade this liability to these appellants?

III.

The Designated Pragmatic Treatment Is Erroneous and Not Sustained by the Evidence.

The Opinion (p. 17) states:

> "The jury made an award of $194,500.00 for the value of the lessee's interest from which the participating interests were carved out. *The Government settled with the owners" True!*

The Opinion (p. 3) states:

> "The jury rendered a verdict which recited 'H-1-W-I' —being the total working interests in Treasure Company Well Treasure No. 8—$194,500.00." *True!*

The Opinion (p. 17) states:

> "The trial judge adopted the figure 100 as representing the whole of the lessee's interest, and this he proceeded to divide on a percentage basis *according to the percentages the parties themselves by contract and a state court by decree, had established."* Untrue!

The above ruling does not state a true premise and is *contrary* to the *terms* of the contract referred to and the decree of the state court and hence *contrary to the evidence.**

If the above premise were followed, the uncontradicted evidence *established the fact* that Treasure Company held *only 28.1 per cent,* and 28.1 per cent multiplied by $1,945.00 ($194,500.00 divided into 100 parts) equals $54,654.50 and not $97,767.00, which is erroneously al-

---

*The contract and the state court decree referred to, gave these appellants their percentage interest in *total production,* not in 80.6 per cent of production, which 80.6 per cent of production *was all that the jury verdict covered.*

located to Treasure Company and its assignee Reconstruction Finance Corporation.

The same contract and state court decree by elimination, left 28.1 per cent as the property of the Treasure Company—assigned to Reconstruction Finance Corporation.

Hence the ruling of this Circuit Court of Appeals is contrary to the evidence wherein it adjudges 51 per cent instead of 28.1 per cent as the portion of the award belonging to Reconstruction Finance Corporation.

The United States Supreme Court has held that

> "this court may reverse findings of fact by a trial court where clearly erroneous."
>
> *United States v. United States Gypsum Co.*, 333 U. S. 364, 395 (1947).

The Finding and Judgment allocating 51 per cent instead of 28.1 per cent of the award to Reconstruction Finance Corporation is "clearly erroneous."

The error comes in separating the Lessor's royalty interests from the total royalty interests, and yet claiming the award covered 100 per cent.

THE TOTAL AWARD WAS:

Lessors	19.40%	or	$ 46,815.51	(On basis of jury award)
Working royalty	80.60%	or	194,500.00	(Jury Award)
	100.00%		$241,315.00	

The Lessors were paid out of court. The over-all total according to the jury award would therefore amount to $241,314.65, as follows:

19.40%	Leaseholders interest in award	$ 46,815.51
28.10%	Treasure Co., or R. F. C.	67,809.52
2.5 %	Johnson	6,032.87
1.00%	Bodkin	2,413.15
25.00%	Adamant Company	60,328.00
16.00%	Walter B. Scoville	38,610.40
1.00%	Mr. & Mrs. Hurshel Bullen	2,413.15
1.00%	Dr. & Mrs. Hayward	2,413.15
6.00%	Harry Wynn	14,478.90
100.00%	Total	$241,314.65*

By no stretch of the imagination can the 28.1 per cent royalty interest of Treasure-R.F.C. be stretched to become 51.00 per cent.

Total royalty interests were 100 per cent divided into two classes.

Wherefore, petitioners respectfully urge that a rehearing may be granted and that the mandate of this Court may be stayed pending the disposition of this petition.

Respectfully submitted,

THE ADAMANT COMPANY,
JOE SEEPLE, and
HARRY WYNN,
By LELAND J. ALLEN,
Their Attorney.

(*35 cents difference by not carrying out fractions.)

Certificate of Counsel.

I, Leland J. Allen, counsel for the above named Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, Appellants, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for delay.

LELAND J. ALLEN,

Counsel for Adamant Company, Walter B. Scoville, Joe Seeple and Harry Wynn, Appellants.